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No. 952

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

JOHN P. SPOMAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on December 30, 1964.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals, affirming the conviction of petitioner, was rendered on December 30, 1964. That opinion is reported at 339 F.2d 941 and is reprinted in Appendix "A" hereto, p. App. 1, *infra*. The United States District Court for the Northern District of Illinois, Eastern Division, rendered an oral opinion denying petitioner's motion to suppress evidence. That opinion is unreported, but is printed as Appendix "B" hereto, p. App. 6, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1964. A timely petition for rehearing was denied on January 20, 1965. On February 18, 1965, Mr. Justice Clark signed an order extending the time for filing this petition to and including March 6, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether an alleged waiver of the constitutional guarantees against unreasonable searches and seizures and against self-incrimination is effective, despite the fact that these rights were relinquished by a person being investigated on a criminal charge while he believed that he had no such rights and that he was required to make the incriminating disclosures?

2. Whether the failure of Government agents to advise a suspect that they are investigating a crime allegedly committed by him and that his incriminating disclosures may be used against him requires evidence so obtained to be suppressed if, as a matter of proved fact, the suspect was unaware of the nature of their investigation and of his right to withhold incriminating documents and information?

STATEMENT OF THE CASE

Petitioner was charged by indictment (A. 3-5)[1] with attempted evasion of income taxes due from him and his wife for the calendar years 1958, 1959 and 1960. Petitioner pleaded "not guilty" to the charges and he filed a motion to suppress certain evidence, supported by petitioner's affidavit (A. 6-9). The Government answered (A. 9-11), and the District Court heard evidence on the motion.

Internal Revenue Special Agent George A. Lorenz testified as an adverse witness called by petitioner (A. 11-30). He testified that, on May 31, 1961, he had gone to petitioner's dry cleaning shop accompanied by Ralph Scheidt, another special agent, to make a criminal investigation (A. 13-14). Lorenz introduced himself as a special agent of the Intelligence Division of the Internal Revenue Service and he introduced Scheidt as "Agent Scheidt". Both Lorenz and Scheidt exhibited their pocket commissions (A. 15). Lorenz told petitioner he wanted to speak with him about his income tax, and the parties went back to petitioner's private office (A. 15).

Lorenz showed defendant his 1958 and 1959 returns. Petitioner said that they bore his signature (A. 16). Lorenz then questioned petitioner extensively about financial matters pertinent to the tax returns (A. 19-20). He did not tell petitioner that anything he said could be used against him nor that he had any constitutional right to refrain from conversation with the agents (A. 16). Neither did Lorenz advise petitioner that he had the right to consult

[1] The designation "A." refers to the Appendix filed in the Court below, which has been certified and filed with this Petition.

an attorney or other advisor, but, after he had been there about one half-hour, he asked petitioner for his records (A. 17). Petitioner furnished some records and he told the agents where they could find other records, all of which they examined for most of that day (A. 22). Scheidt's testimony was, in general, corrobative of Lorenz's (A. 31-39).

Petitioner testified that, on the day in question, Lorenz introduced himself as "Mr. Lorenz" and that Lorenz and Scheidt showed him cards (A. 44). When they went back to petitioner's office, Lorenz asked him whether he had any credit coming from his tax returns. Petitioner replied that the only possibility would be the medical end of the return (A. 45). Lorenz then asked to examine his records. Petitioner asked him if he had to see them then. Lorenz said, "Yes, I want to see them now" (A. 45). Petitioner then furnished the records. At no time did Lorenz tell petitioner that he was making a criminal investigation or advise him of his constitutional rights. Petitioner did not then know that he had the right to refrain from answering questions or giving records to the agents (A. 45). He first learned of his rights in that respect when he contacted a lawyer, who referred him to an accountant, Robert J. Roche (A. 45-46). Roche advised him that he had constitutional rights and that he did not have to turn over his records; this was the first time petitioner learned of those rights. The Court sustained objection to the question, "Now, if you had been aware that you had a right to refuse to turn those records over to the agents and answer their questions, would you have turned them over?" (A. 46).

Petitioner offered to prove through Roche, a certified public accountant, that on June 9, 1961, nine days after the interview with Lorenz, Roche had conferred with petitioner; that petitioner had stated he was unaware of his

constitutional rights, saying, "I didn't realize that you could do that, that once they came in as Government Agents I thought we had to give them the records;" and that Roche had advised him of his rights (A. 51-54). Objection was sustained to this proof on the ground that petitioner's state of mind was not in issue (A.52). An offer of similar testimony by Robert Roche's brother, Edward Roche, was also overruled (A. 53-54).

On the basis of the foregoing testimony, the Court denied defendant's motion to suppress. Its oral opinion is attached hereto as Appendix "B".

Subsequently, the cause was tried to the court without a jury on the basis of stipulations and oral testimony. The evidence established the elements of the offense charged, but both the testimony and stipulations were received over petitioner's objection that the evidence obtained from him should have been suppressed.

On the trial of the cause, it was established that all of the income not reported represented payments for cleaning services by Avalon Laundry (A. 72). Lorenz established the discrepancy by comparing a list he had obtained from petitioner on May 31 with records of Avalon (A. 70-71). On June 6, before petitioner had consulted Roche, Lorenz confronted petitioner with the discrepancy. Petitioner then admitted the understatement and he furnished Lorenz with the correct amounts received from Avalon (A. 73-74).

The District Court found petitioner guilty on all three counts of the indictment and sentenced him to serve two years on probation, the first sixty days to be in a local penal institution, and a fine aggregating $5,000 (A. 79-80). On appeal to the Court of Appeals for the Seventh Circuit, this judgment was affirmed on December 30, 1964, and petitioner's timely petition for rehearing was denied on January 20, 1965.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with applicable decisions of this Court and of other courts of appeals which hold that a person relinquishing personal rights guaranteed by the Federal Constitution, in ignorance that such rights exist, has not voluntarily waived them. The decision also approves a standard of conduct in the enforcement of the Federal criminal law, not heretofore reviewed by this Court, which tends to impair the constitutional privileges respecting seizures and self-incrimination.

The Court below was presented with the question whether a suspect ignorant of his constitutional rights had waived them. It responded to that question by asserting the rule that Federal agents are not obliged to disclose to a suspect the nature of their investigation or to warn him of the consequences of his voluntary disclosure of incriminating information. That rule has been stated in several decisions of the courts of appeals, but it has not been decided by this Court. See *e.g.*, *United States* v. *Achilli* (7 Cir., 1956), 234 F. 2d 797, aff'd. 353 U.S. 373[2]; *Grant* v. *United States* (2 Cir., 1961), 291 F. 2d 227, vacated on procedural grounds 369 U.S. 401.

We contended in the Court below and we still contend that this question cannot be considered separately from the fact of petitioner's ignorance of his rights. It would seem clear that a person fully informed of his rights may voluntarily waive them, notwithstanding that he may have obtained his knowledge from a source other than the Government. Hence, the question presented in this case is a narrow one: if, as a matter of fact, the suspect is ignorant of the nature of the agents' inquiry and of his

[2] The grant of certiorari in *Achilli* limited the scope of review to an issue not related to the one here pertinent.

right to remain silent, and if the investigating agents fail to make full disclosure to him, should the evidence so obtained be suppressed? It is not essential to this issue whether Government agents have no absolute duty to give warning, as the Court below thought; what is essential is whether, in failing to give warning, they run the risk that the disclosures obtained may not be admissible because of the suspect's proved ignorance.

The decision below necessarily holds that a taxpayer, being investigated for a felony under the Internal Revenue Code, voluntarily waived his rights with respect to unreasonable seizures and to self-incrimination where he permitted Government agents to seize his personal papers and to obtain incriminating oral statements while he was totally ignorant of his constitutional right to refuse to do so. This decision cannot be reconciled with the principle that waiver implies knowledge of the right waived and that ignorance vitiates any asserted waiver.

The uncontradicted evidence is that petitioner was totally ignorant of the fact that he had the rights supposedly waived. Nothing in the record supports the contrary inference, and neither of the courts below found to the contrary. Indeed, the law is clear that the burden was on the Government to prove knowledge, yet the prosecution offered no evidence on this issue. *United States* v. *Arrington* (7 Cir., 1954), 215 F. 2d 630, 633. By holding that petitioner waived them, the Court below has in effect determined that those most in need of the protection of the constitutional privileges—the ignorant and unsophisticated—are least likely to succeed in invoking them. Such a conclusion surely cannot be valid.

This Court has held that ". . . waiver is ordinarily an intentional relinquishment or abandonment of a known

right or privilege" and that every reasonable presumption will be indulged against waiver of fundamental constitutional rights. *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). That case involved the right to counsel. The courts of appeals have held that a defendant's ignorance vitiates asserted waivers of other great rights: freedom from unreasonable searches and seizures (*Nelson* v. *United States*, D.C. Cir., 1953, 208 F. 2d 505, cert. den. 346 U.S. 827); privilege against self-incrimination (*Wood* v. *United States*, D.C. Cir., 1942, 128 F. 2d 265, 276-278); right to be present at trial (*Evans* v. *United States*, 6 Cir., 1960, 284 F. 2d 393, 395).

The decision below is also clearly inconsistent with the principles announced in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). That case holds that a suspect under interrogation, prior to formal proceedings against him, had the right to obtain professional advice concerning his privilege to remain silent. That holding necessarily implies the principle that an ignorant waiver of the privilege is no waiver at all. The Opinion of this Court expresses that concept in these words:

> "We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights." 378 U.S. 490.

The rationale adopted by the Court of Appeals has substantial importance in the enforcement of all criminal statutes, but it has particular significance with respect to the revenue laws. Citizens, especially those engaged in

business, are conditioned to inquiries by revenue agents, whose purpose is to determine whether additional tax is due and with whom they readily cooperate. But rarely would a citizen realize that the sole concern of "special" agents is to investigate alleged criminal violations. The fine distinction between "revenue" and "special" agents is not so widely known that the warning inherent in the appearance of police or F.B.I. agents is present. This circumstance makes deception inherent in the conduct of a "special" agent who undertakes to interrogate a taxpayer without some explanation as to the nature of his inquiry. Experience demonstrates that the unwary taxpayer will make the incriminating disclosures, thus, for all practical purposes, becoming the principal witness against himself.

We submit that this case presents a serious question whether such conduct by the Government is a denial of due process and whether it calls for the exercise of the supervisory authority of this Court. Moreover, the present case is a particularly appropriate vehicle for the resolution of this important question. Petitioner not only failed to understand that he had been singled out as a criminal suspect, but he was also ignorant of his fundamental rights. The agents fostered this two-headed misunderstanding by informing him of no more than the fact that they were "special" agents. Their demands for petitioner's cooperation, accompanied by the presentation of their official credentials, persuaded him that he could not properly refuse to comply. Cf. *Johnson* v. *United States* (1948), 333 U.S. 10, 13; *Newman* v. *United States* (5 Cir., 1960), 277 F.2d 794, 797. Moreover, the failure to give warning under the circumstances of this case is even more prejudicial than the corresponding failure of a court to warn a defendant of his rights because, in the latter case, the formal nature

of the proceedings has at least put defendant on notice that he is charged with a crime.

The rule adhered to below tends to erode the constitutional guarantees. Specifically, it encourages the Government to use devious methods; it saddles the unsophisticated taxpayer with a disadvantage not imposed upon others; it limits rights of a fundamental nature; and it is manifestly important in the day-to-day administration of the laws. We respectfully submit that this Court should consider it on the merits.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted

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